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IN THE

Supreme Court of the United States

OCTOBER TERM, 1937—No. 316

CONNECTICUT GENERAL LIFE INSURANCE COMPANY, **APPELLANT**

v.

CHARLES G. JOHNSON, AS TREASURER OF THE STATE OF CALIFORNIA, **APPELLEE**

Appeal from the Supreme Court of the State of California

BRIEF FOR CONNECTICUT GENERAL LIFE INS. CO.

California cannot lawfully tax Connecticut General Life Insurance Company on reinsurance business done exclusively in Connecticut, no part of which was done in California.

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Opinion Below: *Conn. General v. Johnson,* 93 Cal. Dec. 4650; R. 27 (1937) decided in part on authority of *Conn. General v. Johnson,* 3 Cal. (2d) 83 (1935), appeal dismissed "for want of a properly presented federal question," 296 U. S. 535.

Jurisdictional Authority: Judicial Code §237(a). Rule 12 has been complied with, and probable jurisdiction noted, ... U. S. ... (Oct. 11, 1937).

Statutes Involved: California Constitution, Art. XIII (b) (f); California Civil Code (Deering, 1931) §§2646, 2648, 2649; California Political Code, §3664b.

Date of Judgment: April 26, 1937.

Nature of the Case, Rulings, etc.: California taxed Conn. General on reinsurance business done entirely in Connecticut (R. 1-22). Conn. General sued to recover the tax paid under protest, but its suits were dismissed on demurrer (R. 11, 23). On appeal, the California Supreme Court upheld the tax, against the claim of Conn. General that its rights under the 14th Amendment were violated (R. 27-32). Conn. General appealed.

In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937—No. 316

CONNECTICUT GENERAL LIFE INSURANCE COMPANY,
Appellant,

v.

CHARLES G. JOHNSON, AS TREASURER OF THE STATE OF CALIFORNIA,
Appellee.

Appeal from the Supreme Court of the State of California

BRIEF FOR CONNECTICUT GENERAL LIFE INS. CO.

The sole question involved is whether California had the constitutional power to impose a $21,737 tax on the Connecticut General Life Insurance Company, viz, as a 2.6% tax upon $836,061.72 reinsurance premiums which various life insurance companies paid to Conn. General *in Connecticut,* because Conn. General (by reinsurance "treaties" made *in Connecticut*) had agreed to indemnify such other companies against liability under certain of their California policies—no act on the part of Conn. General having been done in California, but everything was done exclusively in Hartford, Connecticut.

The point is that, under the 14th Amendment, California cannot tax a Connecticut corporation on account of its reinsurance business done exclusively *in Connecticut,* no part of which business was transacted in California.

Relevant Statutes

The California Constitution, Art. XIII, §14(b)(f), provides as follows (Const. Cal., Treadwell's 6th Ed., 1931):

"(b) **Taxes on insurance companies.** Every insurance company or association doing business in this state shall annually pay to the state a tax of one and one-half per cent* upon the amount of the gross premiums received upon its business done in this state**, less return premiums and reinsurance in companies or associations authorized to do business in this state; . . .

(f) **Provisions self-executing, etc.** All the provisions of this section shall be self-executing. . . . The rates of taxation fixed in this section shall remain in force until changed by the legislature . . ."

The California Civil Code provides (Deering Ed. 1931; Cf. Ins. Code 1935, ch. 8, Reinsurance, §§620-623):

"§2646. **Reinsurance, what.** A contract of reinsurance is one by which an insurer procures a third person to insure him against loss or liability by reason of such original insurance.

§2648. **Reinsurance presumed to be against liability.** A reinsurance is presumed to be a contract of indemnity against liability, and not merely against damage.

§2649. **Original insured has no interest.** The original insured has no interest in a contract of reinsurance."

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* By an Act of March 5, 1921 (Stats. 1921, ch. 22, p. 20-21; Political Code §3664b) the 1½% tax was increased to a 2.6% tax, pursuant to the reserved power conferred by the Constitution, Art. XIII, §14(f).

** Although *literally* the 2.6% tax is imposed only upon "the gross premiums received upon its *business done in this state* [California]", the Supreme Court of California *con-*

STATEMENT OF THE CASE

1. *Conn. General's reinsurance business in 1930-31.* For many years, Conn. General (a Connecticut corporation) has been engaged in the following two lines of business:

I. **Life insurance** *(in many States including California).* In 1930-31, Conn. General collected $750,252.45 premiums on its California business; and it paid the full 2.6% tax thereon, amounting to $19,506.56 (R. 6, 7, 18, 19). There is no controversy over that tax.

II. **Reinsurance** *(but always in Hartford, Connecticut only)* of other life insurance companies against liability under certain of such other companies' policies in California and other States—in some of which States Conn. General was admitted to do business, and in others it was not so admitted.

No part of Conn. General's reinsurance business has ever been conducted in California; nor was any record of such business ever kept in California; and no Conn. General agent has ever done any act in California in connection with such reinsurance business (R. 3, 15).

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strued that language to include reinsurance premiums *paid in Connecticut for reinsurance business done exclusively in Connecticut* (outside of California); and held that California could impose a 2.6% tax upon the $836,061.72 reinsurance premiums which the Connecticut corporation received *in Connecticut* (outside of California), in return for which the Connecticut corporation reinsured (*in Connecticut*) various life insurance companies by indemnifying them against certain liabilities under their California policies (*Conn. General* v. *Johnson*, 3 Cal. (2d) 83 (1935); *Conn. General* v. *Johnson*, 93 Cal. Dec. 4650 (1937); R. 27).

Such *constructon* of the California Constitution is, of course, binding here.

Conn. General's reinsurance business was transacted solely as follows:

Various life insurance companies entered into reinsurance agreements or "treaties"* with Conn. General, at Hartford, Conn., by which "treaties" Conn. General agreed to indemnify such other companies against liability under designated life insurance policies which such other companies issued in various States, including California (R. 2, 3, 14, 15).

Conn. General never had any dealings with, nor assumed any liability whatsoever toward, nor collected

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* Reinsurance "treaties" (or "compacts") have had an established meaning for more than two hundred years. This Court has aptly pointed out that a reinsurance agreement or "treaty" (as it is technically called) is one of indemnity only, by which the reinsurer agrees to pay to the reinsured any loss sustained under the policy to the extent of the reinsurance; that the reinsured's claim for indemnity rests upon its own *liability* to pay the loss to the policyholder, and (in the absence of express language to the contrary, *Fidelity & Deposit Co.* v. *Pink*, ... U. S. ....., decided Dec. 6, 1937) is not dependent upon its own prior payment of (or ability to pay) the loss to such policyholder; that the reinsured company does not have to pay the loss *before* enforcing his claim against the reinsurer (*Allemannia Ins. Co.* v. *Firemen's Ins. Co.*, 209 U. S. 326, 332); that even the insolvency of the reinsured company (and its consequent inability to pay the loss to the policyholder) does not relieve the reinsurer of its obligation to pay the full amount of the reinsurance (*Id.; Hicks* v. *Poe*, 269 U. S. 118, 121); but that "Reinsurance involves no transaction or privity between the reinsurer and those [policyholders] orginally assured" (*Morris & Co.* v. *Ins. Co.*, 279 U. S. 405, 408).

The California law is likewise (*Conn. General* v. *Johnson*, 3 Cal. (2d) 83, 87; Calif. Civil Code, §§2646, 2649). Other State decisions are uniformly to the same effect (see, for example, *Vial* v. *Norwich Union Ins. Co.*, 257 Ill. 355; *Barnes* v. *Ins. Co.*, 56 Minn. 38; *American Bonding Co.* v. *American Surety Co.*, 127 Va. 209).

any premiums from, any of such *other* companies' *policyholders* in California or elsewhere; it never issued any policy to any such *policyholder* or to any such other companies; and it never did anything whatever in California in connection with the reinsurance business (R. 3, 15).

Such other companies always paid to Conn. General the full reinsurance premiums due under the treaties, by mailing their checks to Conn. General at Hartford, Connecticut. Correspondingly, Conn. General made all indemnity payments to such other companies by mailing its own checks from Hartford, Connecticut, to such other companies (R. 3, 4, 15, 16).

2. Conn. General's collection in Hartford, Connecticut, of $836,061.72 premiums under the reinsurance treaties, insofar as they related to California policies of other companies. In 1930-1931 (by checks mailed from their respective Home Offices to Conn. General at Hartford, Connecticut) various life insurance companies paid to Conn. General *in Connecticut* the total amounts due it for reinsurance premiums (R. 3, 4, 15, 16).

Those checks included $836,061.72 reinsurance premiums for the Conn. General's indemnifying such other companies against liability under certain of their California policies, to-wit (R. 4, 16):

1930	$416,594.03
1931	$419,467.69
Total	$836,061.72

For those years, Conn. General filed its Annual Reports with the California Insurance Commissioner (in the form required by him), wherein it showed that it had received (outside of California) the said $836,061.72 reinsurance premiums for its reinsurance (outside of California) of such other life insurance companies against liability under their California policies (R. 4, 5, 16).

3. *California taxed Conn. General $21,737.60 on account of such $836,061.72 reinsurance premiums paid to Conn. General in Hartford, Conn.* California imposed, and Conn. General paid (under protest), a 2.6% tax ($21,737.60) on account of the above $836,061.72 as follows (R. 6-7, 18-19):

$836,061.72 reinsurance premiums which Conn. General collected in Hartford, Conn.		California's 2.6% tax on the $836,061.72	Conn. General's payment (under protest) of the $21,737.60 tax	
1930	$416,594.08	$10,831.44	Aug. 7, 1931, Jan. 23, 1932,	$5,415.72 $5,415.72
1931	$419,467.69	$10,906.16	Aug. 15, 1932, Feb. 2, 1933,	$5,453.08 $5,453.08
Total,	$836,061.72	$21,737.60	. . Tax . .	$21,737.60

4. *Decision below; and this Appeal.* Conn. General then sued the State Treasurer, Johnson, to recover the $21,737.60 taxes paid (R. 1-9, 13-21).

The suits were dismissed on demurrers (R. 11, 23). The judgments were affirmed by the Supreme Court of California*. The reasoning of the California Court is so unique and involved that a discussion of its opinion will be postponed to p. 27 *infra*.

This appeal was taken; and probable Federal jurisdiction has been noted.

Assignment of Errors

The ten errors assigned (R. 36-37) are reducible to the single proposition that the admittance of Conn. General to do business in California did not thereby confer

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* On the authority of its prior decision on the 1927-1928 taxes, and for additional reasons regarding the Federal question now raised (R. 27-33; Cf. *Conn. General* v. *Johnson*, 3 Cal. (2d) 83, appeal dismissed, 296 U. S. 535).

any power on California to tax Conn. General on the reinsurance premiums which other life insurance companies paid to Conn. General *in Connecticut* on account of reinsurance treaties *made in Connecticut,* and wholly to be *performed in Connecticut,* whereby Conn. General agreed *in Connecticut* to indemnify such other companies against liability under some of their California policies; and that California's taxation of Conn. General's business *in Connecticut* was a taking of its property without due process of law, and denying Conn. General the equal protection of its laws in violation of the 14th Amendment.

Summary of Points Discussed

1. California cannot lawfully tax Conn. General on the $836,061.72 reinsurance premiums because:

(1) The reinsurance treaties were executed wholly outside of California, to-wit: in Connecticut only, where they were to be performed and actually were performed, and where the $836,061.72 reinsurance premiums were also paid;

(2) Conn. General performed no act and transacted no business of any kind in California respecting such reinsurance;

(3) Therefore, California had no taxing jurisdiction over the reinsurance treaties or the $836,061.72 reinsurance premium payments made in Connecticut.

2. This court should reject the reasoning of the California Supreme Court.

3. California denied Conn. General the equal protection of its laws in holding that Conn. General must pay a tax amounting to 5.5% of its premiums on California business, when other companies, similarly located (but not doing a reinsurance business outside of California) are required to pay 2.6% on California business.

FIRST POINT

California cannot lawfully tax Conn. General on the $836,061.72 reinsurance premiums because:

(1) The reinsurance treaties were executed wholly outside of California, to-wit: in Connecticut only, where they were to be performed and actually were performed, and where the $836,061.72 reinsurance premiums were also paid;

(2) Conn. General performed no act and transacted no business of any kind in California respecting such reinsurance;

(3) Therefore, California had no taxing jurisdiction over the reinsurance treaties or the $836,061.72 reinsurance premium payments made in Connecticut.

The reinsurance treaties were made wholly outside of California, to-wit: *in Connecticut.* The $836,061.72 reinsurance premiums were paid to Conn. General *in Connecticut* only. All indemnity payments which Conn. General paid to the reinsured companies were paid *in Connecticut.* Respecting such reinsurance, Conn. General *performed no act* and *transacted no business* of any kind whatever *in California* (R. 3-4, 15-16; 3 Cal. (2d) 83, 86).

The California Supreme Court correctly pointed out the distinction between contracts of insurance and reinsurance; held that the reinsurance treaties operated solely between Conn. General and the reinsured companies, and involved no transaction or privity whatever between

Conn. General and the California policyholders originally insured; that Conn. General was in no respect liable, as surety or otherwise, to the California policyholders of the reinsured companies; and apparently held that the making of the reinsurance treaties was *not* "doing business" in California but only in Connecticut (R. 27; *Conn. General* v. *Johnson,* 3 Cal. (2d) 83, 87, citing *State* v. *Continental Ins. Co.,* 67 Ind. App. 536, and *In re Continental Cas. Co.,* 189 Iowa 933; California Civil Code, §§2646, 2649; p. 2 *supra,* note; Cf. *Allemannia Ins. Co. Case,* 209 U. S. 326, 332; *Hicks* v. *Poe,* 269 U. S. 118, 121; *Skandinavia Ins. Co. Case,* 279 U. S. 405, 408; *Fidelity & Deposit Co.* v. *Pink,* ..... U. S. ....., (decided Dec. 6, 1937).

We submit:

I. *California had no power to tax either (1) the reinsurance treaties which were executed, were to be performed, and actually were performed outside of California, or (2) the $836,061.72 reinsurance premiums which were never in California, and were paid only in Connecticut.*

As the reinsurance treaties were executed *in Connecticut* where they were to be performed and actually were performed; as the various insurance companies paid to Conn. General *in Connecticut* the $836,061.72 reinsurance premiums, which were always *in Connecticut* and *never* in California; as Conn. General made all payments in discharge of its indemnity under the reinsurance treaties by mailing checks *from Connecticut* directly to the various reinsured companies; as Conn. General *never did anything whatever in California* with respect to the reinsurance treaties or the premiums thereunder; and as

Conn. General never dealt in California, Connecticut or elsewhere with the holders or beneficiaries of the California policies,—therefore, California had no right to tax the $836,061.72.

The authorities quoted in the margin* establish the proposition that California cannot tax reinsurance treaties *made in Connecticut,* or the reinsurance premiums thereunder which were *paid in Connecticut (Frick* v. *Pennsylvania,* 268 U. S. 473, 489, and cases there cited; *Union Transit Co. v. Kentucky,* 199 U. S. 194, 202-204; *Farmers Loan Co.* v. *Minnesota,* 280 U. S. 204, 210; *Safe Deposit & Trust Co.* v. *Virginia,* 280 U. S. 83, 92).

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* In *James* v. *Dravo Contracting Co.,* ..... U. S. ....., decided December 6, 1937, West Virginia taxed a Pennsylvania company upon the amounts it received from the United States for the construction of locks and dams in West Virginia. This Court held that the tax was bad as to so much of the payments as were made on account of the purchase of materials *outside* of West Virginia, and the work done in Pennsylvania on the materials, which when fabricated in Pennsylvania, were shipped to West Virginia for installation. The Court said:

> "As to territorial jurisdiction.—Unless the activities which are the subject of the tax were carried on *within the territorial limits* of West Virginia, the state had no jurisdiction to impose the tax. *Hans Rees' Sons* v. *North Carolina,* 283 U. S., 123, 133, 134, *Shaffer* v. *Carter,* 252 U. S. 37, 57; *Surplus Trading Co.* v. *Cook,* 281 U. S. 647."

After pointing out that the contractor purchased materials *outside* of West Virginia, from which materials it manufactured *in Pennsylvania* equipment for a job, and then shipped such equipment to West Virginia for installation, the Court said:

> "It is clear that West Virginia had no jurisdiction to lay a tax upon respondent with respect to this work *done in Pennsylvania.* As to the material and equipment there fabricated, the business and activities of respondent in

In *St. Louis Compress Co.* v. *Arkansas,* 260 U. S. 346, a Missouri corporation (doing business in Arkansas) secured insurance policies in Missouri covering its own property in Arkansas. Arkansas taxed the Missouri corporation upon the premiums it paid in Missouri. The tax was held void, this Court saying:

> "The Arkansas tax manifests . . . a purpose to discourage insuring in companies that do not pay tribute to the state. This case is stronger than that of *Allgeyer* in that here no act was done within the State, whereas there a letter constituting a step in the contract was posted within the jurisdiction. It is true that the State may regulate the activities of foreign corporations within the State but it cannot regulate or interfere with what they do outside."

So here Conn. General *did no act in California* even remotely connected with the reinsurance.

In *People ex rel. Sea Ins. Co.* v. *Graves,* 274 N. Y. 312, an English insurance company (doing business in New York) made a reinsurance treaty *in New Jersey* with Hartford and Federal (insurance companies also

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West Virginia consisted of the *installation* at the respective sites within that state and an apportionment would in any event be necessary to limit the tax accordingly. *Hans Rees' Sons* v. *North Carolina, supra.*"

In the case at bar, *Conn. General had no activities of any kind* in California with respect to the reinsurance treaties or premiums, all of which were transacted *exclusively in Connecticut.*

If Conn. General had carried on in California any part of its activities with respect to the reinsurance treaties, premiums paid, or liabilities thereunder, a different question would arise; and there might be a possible apportionment of taxable liability as between Connecticut and California (*Hans Rees' Sons Case, supra*); but even that question cannot arise here, as Conn. General *did absolutely nothing in California* arising under, or in the slightest degree related to, the reinsurance treaties or the reinsurance premiums.

doing business in New York), by which the English company reinsured some of the New York risks of Hartford and Federal, who paid the reinsurance premiums to the English company *in New Jersey*. New York then attempted to tax the English company (just as California attempts to tax Conn. General) on the reinsurance premiums which the English company had received in New Jersey from Hartford and Federal, who had thus reinsured some of their New York risks.

The Court of Appeals of New York held that New York could not tax the English company on account of the reinsurance premiums so received by it *in New Jersey* for reinsuring New York risks. The Court pointed out that the English Company had no contract relation with the New York owners of the property insured. Its only contract was with Federal and Hartford, which was a *New Jersey* contract. After a full discussion of the subject, the Court said:

> ". . . the parties insured directly in New York had no contract with relator [English company] and could not enforce the reinsurance contract against it in case of loss. That company [English company] was a stranger in fact and in law to the parties insured under the New York contracts made with the Federal and Hartford. In the event of a loss on a policy issued by the Hartford in New York, the insured looked to the Hartford alone and the latter would look to the relator [English company] under its New Jersey contract for the portion of the loss which it had reinsured. No act of the original insured brought the reinsurance contract into effect. The insured would not even know that a reinsurance contract existed (*Morris & Co.* v. *Skandinavia Ins. Co.*, 279 U. S. 405).
>
> "The premiums received by relator [English company] were contracted for in New Jersey and were received there. Its capacity to make and perform its contract was not derived

from the laws of New York (*Alaska Packers Assn.* v. *Industrial Accident Comm.*, 294 U. S. 532, 540)."

As there, so here. Just as New York could not tax an English company (doing business in New York) on the reinsurance premiums which the English company received *in New Jersey* under a reinsurance treaty *made in New Jersey,* reinsuring some of Federal's and Hartford's *New York* risks, so California cannot tax Conn. General on the reinsurance premiums which various companies paid to Conn. General *in Connecticut* for the reinsurance of those companies' California risks.

In *Hartford Ind. Co.* v. *Delta Co.,* 292 U. S. 143, 149, it was said:

"A state . . . cannot extend the effect of its laws beyond its borders so as to destroy or impair the right of citizens of other states to make a contract not operative within its jurisdiction, and lawful where made."

In *Alaska Packers Assn.* v. *Comm'n.,* 294 U. S. 532, 540, it was said:

"Similarly, a state may not penalize or tax a contract entered into and to be performed outside the state, although one of the contracting parties is within the state."

See also *Allgeyer* v. *Louisiana,* 165 U. S. 578, 591-592; *New York Life v. Head,* 234 U. S. 149, 161-164; *New York Life* v. *Dodge,* 246 U. S. 357, 374.

II. *California did not, and could not, confer on Conn. General any franchise or privilege to make reinsurance treaties outside of California; and, therefore, California has no power to tax Conn. General with respect to reinsurance contracts made, paid for and wholly to be performed in Connecticut.*

Conn. General's power or authority to enter into the

reinsurance treaties in Connecticut, and there to collect the reinsurance premiums thereunder, was derived solely from the State of Connecticut. With those transactions, California had no concern, and could not possibly confer any privilege or franchise on Conn. General to enter into them.

Therefore (while California can tax Conn. General for the privilege of doing either a life insurance business or a reinsurance* business *in California*), it cannot tax Conn. General for the privilege of doing acts *beyond* the territorial limits of California.

The privilege or franchise which California granted concerns only reinsurance business *done* in California; whereas, the tax in dispute concerns only reinsurance business *not done* in California. California has attempted to tax Conn. General on account of a franchise *not granted,* and on account of a privilege *not exercised.*

The California Supreme Court has said recently that the gross premiums tax here involved is an excise tax in the nature of a franchise tax. *Northwestern Mutual Ins. Co.* v. *Johnson,* 8 Cal. (2d)—, 63 Pac. (2d) 814, 816 (1936). It is not a property tax. *Carpenter* v. *Peoples Mutual,* 94 Cal. Dec. 674; *Consolidated Title Co.* v. *Hopkins,* 1 Cal. (2d) 414, 419. As here applied, it is a franchise tax for a franchise not granted.

California cannot tax a license or privilege it does not grant. For a State to exact a license tax from a foreign corporation for a privilege the State does not grant is depriving that corporation of its property without due process of law (*Chicago R. R. Co.* v. *Chicago,* 166 U. S. 226; *Union Transit Co.* v. *Kentucky,* 199 U. S. 194, 202, *Provident Savings* v. *Kentucky,* 239 U. S. 103).

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* Conn. General never did any reinsurance business in California; nor did it do any act in California in connection with any reinsurance business either there or elsewhere.

In *Provident Savings Assn.* v. *Kentucky,* 239 U. S. 103, a New York insurance company had been admitted to do business in Kentucky, and had a large number of Kentucky policies outstanding. It withdrew entirely from Kentucky. Thereafter, the Kentucky policyholders paid their premiums by mailing checks to the company in New York. Kentucky attempted to tax the amount of the premiums thus forwarded by Kentucky policyholders to the company in New York.

This Court held that the tax was void because the taxing power of Kentucky could not extend to a company in New York which merely received there, by mail, premium payments from its Kentucky policyholders. Kentucky argued that the existence of Kentucky policies, their continuance in force, and the necessity of mailing the premiums therefor from Kentucky to New York, gave Kentucky the right to tax such premiums. In response to that argument, this Court said:

> "Taxation without jurisdiction has been held to be a violation of the Fourteenth Amendment [citation omitted]; and the principle involved applies to the assertion of authority on the part of the State to exact a license tax for the privilege of doing acts which lie beyond the sphere of local control. It follows that the quality of the acts with respect to which the State exercises the taxing power must be considered when the constitutional protection against the transgression of jurisdictional limits is invoked . . . As the policies remained in force, it is said the company continued to furnish protection to citizens of Kentucky. The renewal premiums, as already stated, were paid in New York. There is, however, a manifest difficulty in holding that the mere continuance of the obligation of the policies constituted the transaction of a local business for which a privilege tax could be exacted. As a privilege tax, the tax rests upon the assumption that what is done depends upon the State's consent. But the continuance of the contracts of insurance

> already written by the Company was not dependent on the consent of the State . . . These policies are contracts already made; the State cannot destroy them or make their continuance, independent of acts within its limits, a privilege to be granted or withheld. Neither the continuance of the obligation in itself, nor acts done elsewhere on account of it, can be regarded as being within the State's control [citation omitted] . . . In the present case, the question is . . . as to the power of the State to treat the mere continuance of the obligation of the existing policies held by resident policy holders as the transaction of a local business justifying the imposition of an annual privilege tax in the absence of the actual conduct of business within the limits of the State."

So far as the taxation of the reinsurance premiums here involved is concerned, Conn. General is much further removed from California's authority than Provident Savings was removed from Kentucky's taxing power. *Provident Savings'* own policies had been executed, delivered and held in Kentucky by Kentucky policyholders while Provident Savings was doing business in Kentucky; and after its withdrawal from Kentucky, its policies were still kept in force by Kentucky policyholders mailing the premium payments from Kentucky to New York. **Yet Kentucky could not tax those premium payments.** In the case at bar, the reinsurance contracts were *not* made or executed in California, but solely in Connecticut. The reinsured "policyholders" were *not* California persons, but were various life insurance companies, who paid their reinsurance premiums *in Connecticut.*

There was no privity between Conn. General and the California policyholders of the other companies. Those California policyholders could not even sue Conn. General upon the reinsurance treaties.

It necessarily follows that California has absolutely no power to tax Conn. General on account of the trans-

actions which took place *in Connecticut* between Conn. General and other life insurance companies, by which the latter there paid the $836,061.72 reinsurance premiums to Conn. General.

If California has any power to tax the $836,061.72, it must be upon some ground *other* than the naked right to tax reinsurance premiums paid *in Connecticut* under a contract wholly executed, to be performed and actually performed in Connecticut.

III. *As the price of admitting Conn. General into California to do a life insurance and reinsurance business therein, California has no right to tax Conn. General with respect to reinsurance treaties or the reinsurance premiums thereunder,—all respectively executed, paid and wholly performed in Connecticut.*

California may concede that it cannot tax, as such, reinsurance treaties made, or reinsurance premiums paid, in Connecticut; and yet it may argue that, as the *price* of admitting Conn. General (a foreign corporation) into California, and licensing it to do an insurance and reinsurance business therein, California can *measure the price** of that privilege by a tax based, not only upon Conn. General's business done *in California,* but also based upon its reinsurance business *done in Connecticut.*

To that contention, we respond:

1. *St. Louis Compress Co.* v. *Arkansas,* 260 U. S. 346

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* *Horn Silver Mining Co.* v. *New York,* 143 U. S. 305; *New York* v. *Roberts,* 171 U. S. 658, 664; cases cited in *Flint* v. *Stone Tracy Co.,* 220 U. S. 107, 164-167; *Equitable Life Society* v. *Pennsylvania,* 238 U. S. 143, 147; *Compania De Tabacos* v. *Collector,* 275 U. S. 87.

and *People ex rel. Sea Ins. Co.* v. *Graves*, 274 N. Y. 312 (p. 11 *supra*) are direct authorities to the contrary.

In *Boseman* v. *Conn. General Life Ins. Co.*, 301 U. S. 196, Conn. General was admitted and fully *authorized inter alia*, to do an insurance business in Texas, but (just as here with respect to *reinsurance*), it "has never written or delivered a contract or policy of insurance of any kind or character in the State of Texas" (p. 201). Conn. General had many transactions in Connecticut and Pennsylvania with respect to insuring, and it did insure, the Texas employees of the Gulf Oil Co. under a "group" policy. This Court held it was not a Texas contract, and referred to

> "the purpose of the parties to the contract that everywhere it shall have the same meaning and give the same protection and that inequalities and confusion liable to result from applications of diverse state laws shall be avoided [citation omitted]."

The *Boseman* case is in point here because it shows (*a*) that mere admittance and *authority* to do one kind of business (without actually doing it*) does not tend to show that such business *is* done in that State, and (*b*) the impossibility of *construing the reinsurance treaties made in Connecticut* to be subject to the control, taxation or other laws of all the diverse States, residents of which happen to have policies in the companies which reinsured such risks in Conn. General—because, if so, the *same reinsurance treaty* made in Connecticut would be subject to 47 different constructions, taxation etc., and even the "full faith and credit" Clause would fail to compel uniformity in construction etc., of the same instrument.

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* Conn. General did other kinds of business in Texas than insurance.

Futhermore, in *Boseman's* case he was a third-party-beneficiary of the "group" policy and entitled to sue the Conn. General directly; and he held its "individual certificate" "as evidence of the insurance"; whereas, here, the California policyholders of the reinsured companies have no right to sue the Conn. General and do not hold any sort of contractual relation—direct or indirect—with it. *A fortiori,* therefore, if the Boseman contract was not a Texas contract, then Conn. General is not a party to any California contract which can be used as an excuse for California's taxing Conn. General.

In *Home Ins. Co.* v. *Dick,* 281 U. S. 397, 408, Mr. Justice Brandeis aptly said

> "The division of this Court in the *Tabacos* and *Dodge* cases was not on the principle here stated, but on the question of fact whether there were in those cases things done within the State of which the State could properly lay hold as the basis of the regulations there imposed. Compare *Bothwell* v. *Buckbee, Mears Co.,* 275 U. S. 274; *Palmetto Fire Ins. Co.* v. *Conn,* 272 U. S. 295. In the absence of any such things, as in this case, the Court was agreed that a State is without power to impose either public or private obligations on contracts made outside of the State and not to be performed there. Compare *Mutual Life Insurance Co.* v. *Liebing,* 259 U. S. 209; E. Merrick Dodd, Jr., 'The Power of the Supreme Court to Review State Decisions in the Field of Conflict of Laws', 39 Harv. L. Rev. (1926) 533, 548".

2. Although in this particular case California has limited its tax on Conn. General to *that part* of the reinsurance premiums it received in Connecticut for reinsuring the *California* policies of other companies, yet a limitation to *California* policies lends no validity to the tax, because,

(*a*) Conn. General has done nothing in California in

connection with, nor had any transactions in California or elsewhere with, the California policyholders, who cannot sue Conn. General and need not even know of the existence of the reinsurance treaty:

(*b*) If (as the price of granting Conn. General a license to do local business) California can tax the reinsurance premiums paid *in Connecticut* with respect to *other companies'* California policies, it can, with equal constitutional validity, increase the price so as to tax the total reinsurance premiums which Conn. General may receive *for its reinsurance in Connecticut* of other companies' policies throughout the *whole* United States.

(*c*) If, as the price of such admittance, California can tax *reinsurance* premiums collected in *Connecticut*, it can just as logically and constitutionally tax *original* or *renewal* premiums collected by Conn. General in Connecticut, in Massachusetts, and in all the other States of the Union.

(*d*) If California can do that, every other State can do it, with the result that the combined effect of such taxation by forty-eight States would tax life insurance out of existence as the price of doing any business outside each company's home state.

This then again brings up the old question of the power of a State (in prescribing the terms of admission for a foreign corporation to do business within its limits) to exact what have been called "unconstitutional conditions". It is unnecessary here to review the long controversy in this Court between conflicting doctrines*.

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* Cf. *Doyle* v. *Continental Ins. Co.*, 94 U. S. 535, and *Security Mutual* v. *Prewitt*, 202 U. S. 246, on the one hand, with, on the other hand, *Ins. Co.* v. *Morse*, 20 Wall. 445;

The present rule is that California may admit or exclude Conn. General from doing business in California; but if it admits (as it did admit) Conn. General to do business in California, it cannot impose on Conn. General, as a condition of such admission or of continuance therein, that Conn. General shall relinquish its constitutional right to be free of taxation in California on account of transactions *outside* of California, and over which California has no constitutional power or control.

If the State may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all. It is inconceivable that guaranties embedded in the Constitution of the United States may thus be manipulated out of existence (*Frost Trucking Co.* v. *R. R. Comm.*, 271 U. S. 583, 594).

In short, the power to impose conditions of admittance cannot be used to accomplish prohibited results (*Fidelity & Deposit Co.* v. *Tafoya*, 270 U. S. 426; *Miller* v. *Milwaukee*, 272 U. S. 713, 715; *Nichols* v. *Coolidge*, 274 U. S. 531, 541-542).

3. *Equitable Life Society* v. *Pennsylvania*, 238 U. S. 143, and *Compania de Tabacos* v. *Collector*, 275 U. S. 87, do not support California's contention.

In the *Equitable* case, a Pennsylvania statute imposed upon foreign life insurance companies a 2% annual tax on the gross premiums "received from business done within the state". Equitable Life (a foreign corporation)

Barron v. *Burnside*, 121 U. S. 186; *Western Union* v. *Kansas*, 216 U. S. 1; *Herndon* v. *C. R. I. & Pac.*, 218 U. S. 135; *Harrison* v. *St. L. & San Francisco R.*, 232 U. S. 318; *New York Life* v. *Head*, 234 U. S. 149; *Phoenix Ins. Co.* v. *McMasters*, 237 U. S. 63; *Wisconsin* v. *Philadelphia & Reading Coal Co.*, 241 U. S. 329; culminating in *Terral* v. *Burke Constr. Co.*, 257 U. S. 529 (expressly overruling the *Doyle* and *Prewitt* cases), reaffirmed in *Mortensen* v. *Security Ins. Co.*, 289 U. S. 702.

did a large business in Pennsylvania, and paid about $90,000 a year as the 2% tax upon the premiums which it actually collected in Pennsylvania.

It contested the tax upon the *renewal* premiums which its Pennsylvania policyholders mailed directly to the company's New York office. This Court (HOLMES, J.) sustained the tax, on the ground that it was "a tax for the privilege of doing business in the state" and that the state had the "right to consider the benefit thus annually extended into Pennsylvania".

All that the case decided was that for the privilege of doing business in Pennsylvania that State could tax an insurance company on the gross premiums which it collected *from its own Pennsylvania policyholders*—even though some of them mailed their checks to the Company's New York office instead of paying them at its local Pennsylvania office—as the company had to do various acts in Pennsylvania concerning those very policies.

This basis of the *Equitable* decision was quite clearly explained in the *Compania General de Tabacos* case, 275 U. S. 87, 96-98, where this Court minimized some of Mr. Justice Holmes' expressions in the *Equitable* case, and said:

> "This Court said that the Equitable Society was doing business in Pennsylvania when it was annually paying dividends in Pennsylvania, or sending an adjuster into the state in case of dispute, or making proof of death, and therefore that it was not improper to measure the tax for doing business in the state by the number of individuals whose lives had been insured and with respect to whom, and the execution of whose contracts, the company was necessarily doing business in the state, even if the premiums paid by some of them had not been paid in the state."

In short, this Court held that where a company was doing a particular kind of business in a State, incidental

business would have to be transacted in the State in connection with all of its policyholders, even though some of them paid some of their premiums without the State.

The *Equitable* case is no authority that a State may constitutionally levy a premium tax on account of business not done in the State but wholly done outside the State. In the case at bar (unlike the *Equitable* case) Conn. General neither paid dividends in California, nor sent an adjuster into the State, nor had proofs of death made out in the State in connection with its reinsurance treaties. The policyholders in question were not Conn. General policyholders; and indeed they may not, and probably do not, know of any reinsurance. All dealings with the California policyholders would be by the reinsured companies which issued their policies to them, and not by Conn. General.

California may suggest that the protection which it furnishes to California policyholders justifies the tax. This contention must be rejected, because (*a*) such California policyholders were *not* policyholders of Conn. General, but were solely policyholders of the reinsured companies, and (*b*) it was repudiated in the *Compania de Tabacos* case, where, in minimizing Mr. Justice Holmes' language, this Court said:

> "If that [the State's protection of policyholders] were to be admitted, then neither the *Allgeyer* nor the *Compress* case could be sustained, for the property in each of those cases was protected by the government seeking to impose the forbidden exactions upon the owner, who obtained the insurance out of the state, on that property within it."

At the risk of repetition, we insist that the only point in the *Equitable* case (as explained in the *Compania de Tabacos* case) is that, as the Equitable was in fact doing business generally in Pennsylvania with respect to all of

its Pennsylvania policyholders (thereby doing a great many things in Pennsylvania in connection with such policyholders), the incidental fact that some of the policyholders paid renewal premiums in New York, did not prevent Pennsylvania from taxing Equitable on the total amount of the premiums it collected from its Pennsylvania policyholders wherever the premiums might be paid to it.

In the *Compania de Tabacos* case 275 U. S. 87, the Tobacco Co. (a Spanish corporation) was doing business generally in the Philippines, where it owned tobacco stored there. The Tobacco Co.'s head office in Spain insured that tobacco* in Paris and London insurance companies, respectively (1) against marine risks (when the tobacco should be shipped from the Philippines to Europe) in a Paris company which was not licensed to do business in the Philippines and had no agent there, and (2) against fire (in the Philippines) in the London company, which also did business in the Philippines. All marine and fire losses were paid to the Tobacco Co. in Paris and London, respectively.

The Philippines imposed a 1% tax on the Tobacco Co. as the owner of property in the Philippines where such owner insured the property in foreign companies and did not make use of any agent residing in the Philippines.

The case is divided into two parts:

First: the tax on the Tobacco Co. on account of the premiums which it paid for marine insurance to the Paris company in Paris, which company had no agent in the Philippines and did no business there; and

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* Without the use of any agent in the Philippines or any act done there.

Second: the tax on the Tobacco Co. on account of the premiums which it paid for fire insurance to the London Company in London (which latter was doing business, and had an agent, in the Philippines) on the tobacco stored in the Philippines.

First: This Court held that the Philippines had no right to tax the Tobacco Co. (a Spanish company doing business in the Philippines) because it had made a contract in Paris for marine insurance on tobacco shipped from the Philippines to Spain, the premiums for the marine insurance being paid in Paris. The Court said (p. 92):

> "It is an imposition upon a contract not made in the Philippines and having no situs there, and to be measured by money paid as premium in Paris, with the place of payment of loss, if any, in Paris. We are very clear that the contract and the premiums paid under it are not within the jurisdiction of the government of the Philippine Islands."

After reviewing the *Allgeyer* and *Cotton Compress Co.* cases (p. 11, *supra*), this Court said (p. 94):

> "The effect of them is that, as a state is forbidden to deprive a person of his liberty without due process of law, it may not compel any one within its jurisdiction to pay tribute to it for contracts or money paid to secure the benefit of contracts made and to be performed outside of the state."

So here. Although Conn. General, having been admitted to do business in California, is "within its jurisdiction", nevertheless California cannot compel Conn. General to pay tribute for contracts, or money received on account of contracts, made and to be performed outside of California.

This Court reaffirmed the *Allgeyer* and *Compress* cases; and distinguished the *Equitable* case (p. 21, *supra.*).

Second: This Court sustained the tax on the Tobacco Co. for the premiums it paid to the London company for fire insurance on tobacco in the Philippines. It admitted that "The case is a close one." As the Tobacco Co. and the London company were both doing business in the Philippines and made a contract in Europe for the insurance of tobacco in the Philippines, this Court assumed (perhaps unjustifiably) "that this tax, placed upon the assured, must ultimately be paid by the insurer, and treating its real incidence as such", it further assumed that as the London company was doing business in the Philippines it *might* require adjustment of fire risks and the activities of agents in the Philippines with respect to the settlement of losses arising there.

It is doubtful whether this Court had any justification for assuming, as the basis of its decision, that a tax imposed by the Philippines upon the Tobacco Co. *would ultimately be paid by the London company,* or that the London company would have to adjust in the Philippines, or use the activities of its agents there. However that may be, the basis of the decision was that (just as in the *Equitable* case) the London company was doing business in the Philippines and would have to adjust in the Philippines fire risks on the tobacco, and would have to use agents in the Philippines in the settlement of losses (BRANDEIS J., in *Home Ins. Co.* v. *Dick,* 281 U. S. 397, 408, page 19, *supra*); and that hence it could be taxed on the premiums which it collected in London under London contracts for insuring the tobacco, upon the further assumption* that the Tobacco Co. would, in some way, ultimately make the London company pay the tax.

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* It was a rather novel theory that a tax on A could be sustained by assuming that A would in some way make B pay it.

Without stopping to consider the extreme limit to which this part of the case went, it is sufficient to point out that it is inapplicable to the case at bar. Here it is an undisputed fact (not to be overcome by any assumption) that Conn. General did not exercise any right to do business in California by adjusting risks or using any agents in California with respect to the settlement of losses arising under the reinsurance treaties; but that, on the other hand, Conn. General, with respect to reinsurance, did no act in California and took no step there with respect to the reinsurance, but everything was done *outside of California.*

In its last analysis, this Court must decide whether the admittance of a foreign corporation to do business, authorizes California, as the price of such admittance, to tax that corporation with respect to *other* business, which it does exclusively *outside of California,* and in the transaction of which, it does not in any way exercise its license to do business in California.

SECOND POINT

This court should reject the reasoning of the California Supreme Court.

In holding that Conn. General ought to pay a *California* tax on its *Connecticut* transactions, the California Supreme Court based its conclusion upon the extraordinary assumption that a California *tax exemption* granted to *other* insurance companies would confer a *Connecticut benefit* upon Conn. General; and that, therefore, *California* can tax that *Connecticut* benefit!!

To comprehend that unique theory, a clear understanding of the terms and effect of the California tax law

is essential, which can be most easily grasped by successive concrete illustrations.

In levying the 2.6% tax on the "gross premiums received upon its business done in this state" (p. 2 *supra*), California provides for a *deduction* of all *reinsurance* premiums paid to companies authorized to do business in California (Const. Art. XIII §14(b), p. 2 *supra*).

For companies "doing business" in California, the tax situation respecting "gross premiums received upon its business done in this state" and the reinsurance premiums paid to other companies "authorized to do business in this state", works out as follows:

The names and figures are illustrative only.

	Gross Premiums	Tax
1. Equitable did not reinsure any of its risks, but on "business done" in California collected "gross premiums" of	$500,000	
Equitable paid 2.6% tax thereon, or		$13,000
2. New York Life (with the same amount "business done" in California) collected the same "gross premiums" of	$500,000	
But New York Life *reinsured in California* some of its business in the Vermont Life (which does a large reinsurance business *in California*); aid New York Life paid to Vermont Life reinsurance premiums of	$100,000	
	$400,000	

New York Life paid 2.6% tax on $400,000 or	$10,400
Vermont Life also paid, *inter alia*, 2.6% tax on the $100,000 gross premiums it received in California from New York Life,	$2,600
On the $600,000 "gross premiums", California thereby collected [from New York Life ($500,000) and Vermont Life ($100,000) jointly], exactly the same $13,000 tax it collected on the Equitable's $500,000, *supra*	$13,000

So far, so good; and it was California's own private affair if she chose to allow an exemption of reinsurance premiums paid, and was satisfied to collect the same $13,000 tax on the Equitable's $500,000 business, as she collected on $600,000 business done by the New York Life and Vermont Life.

But the next illustrations show where the "shoe pinches" which caused the suit at bar.

3. Conn. General (like the Equitable) collected on its "business done" *in California* "gross premiums" of	$500,000	
Conn. General paid 2.6% thereon or		$13,000

4. Atlantic Life (on its California business) collected "gross premiums" of	$500,000	
Atlantic Life then made a reinsurance "treaty" *in Connecticut* (instead of in California as in the case of the New York Life - Vermont Life, *supra*) by which Conn. General reinsured *in Connecticut* some of the Atlantic Life's risks, for which Atlantic Life paid Conn. General *in Connecticut* $100,000 reinsurance premiums; and Atlantic Life took the allowable deduction for such reinsurance premiums paid	$100,000	
	$400,000	
Atlantic Life paid its 2.6% tax on such $400,000		$10,400

California's complaint is that while on "business done" in California, (*a*) the Equitable and Conn. General (each collecting $500,000 "gross premiums") paid $13,000 apiece, and (*b*) New York Life and Vermont Life (jointly collecting $600,000 gross premiums) pay jointly $13,000, *nevertheless,* (*c*) Atlantic Life (also collecting $500,000 "gross premiums" pays only $10,400 tax.

Therefore, California seeks to make Conn. General (even though it has paid $13,000 tax on all its $500,000 "business done" in California—the same as the Equitable) pay an additional $2,600 tax, so as to make California's tax receipts the same ($13,000) on the combi-

nation of Atlantic Life-Conn. General business as on the combination of New York Life-Vermont Life business.

That is the case here.

But California overlooks this vital distinction: Vermont Life had a $100,000 "gross premium" collection *in California* on its reinsurance "business done" *in California,* and, of course, paid $2,600 tax on account thereof; *whereas,* Conn. General paid its full $13,000 tax on its $500,000 "gross premium" business done in California, but Conn. General paid no tax on its $100,000 reinsurance premium business, because such reinsurance business (totally unlike the Vermont Life) was not done in California, but was done exclusively in Connecticut; and, therefore, Conn. General does not have to pay California a tax upon business done in Connecticut.

We are not here concerned with the fact that California taxed New York Life (with $500,000 premium income) *plus* Vermont Life (with $100,000 premium income) only $13,000, while it taxed Equitable (with *only* $500,000 premium income) $13,000—although such unequal taxation may be a denial of equal protection (see p. 37 *infra*).

But we are very much concerned that after California (for its own reasons of internal policy) voluntarily chooses to allow insurance companies a deduction of reinsurance premiums, it attempts *to make up that loss of revenue* (resulting from its own favor) by singling out Conn. General (which paid its *full taxes* on all business done *in California*) and taxing it on business *not done* in California, but done exclusively in Connecticut.

With the foregoing brief explanation, we will now examine,

THE GROUNDS OF THE DECISION BELOW WHICH MAY BE THUS BRIEFLY SUMMARIZED:

I. Correct Propositions

1. Conn. General was authorized to do a reinsurance business in California because reinsurance is a mere modification of ordinary insurance, and was included in its authorization to do an insurance business in California (R. 29-30, 32).

2. Conn. General's reinsurance treaties were "executed wholly *without* the state of California"; all payments therefor were received at Hartford, Conn.; and "it performed no act of any kind and transacted no business of any kind [respecting reinsurance] in the state of California" (R. 28; 3 Cal. (2d) 83, 86).

3. In determining the amount of premiums on which the 2.6% tax is to be computed, California permits an insurance company doing business in California to deduct from the gross premiums received on its California business, all reinsurance consideration which it pays to other authorized companies on account of reinsurance treaties there made and there to be performed (R. 32; Cal. Const. Art. XIII, § 14(b).

II. Erroneous Propositions

From the foregoing conceded propositions, the California Supreme Court drew the erroneous conclusion that Conn. General ought to pay a tax on its *Connecticut* transactions for the extraordinary reason that it assumed that Conn. General received a Connecticut benefit from a California tax exemption allowed to *other* companies!

The California Court's novel reasoning is as follows:

1. The California tax exemption allowed to such *other* companies was a financial benefit to *them;* and

thereby *enabled* such other companies to pay Conn. General a higher premium in Connecticut for the reinsurance than such other companies could have otherwise afforded to pay to Conn. General! (R. 32); *whereas;* if California should hold that Conn. General was *not* liable for the 2.6% tax on its receipts *in Connecticut* then California would have to refuse such other companies (doing business in California) a deduction from *their* gross premiums of the amount so paid to Conn. General in Connecticut for reinsurance; this would cause such other companies to pay higher taxes in California, with the result that they would not be able to pay to Conn. General the reinsurance rates previously paid; hence, in either event, so the argument runs, Conn. General would lose on its reinsurance business in Connecticut, by the inability of the other companies to pay the rates which Conn. General demanded; and, therefore, Conn. General would either have to refuse the reinsurance business or reduce its reinsurance premiums (R. 32).

By that unusual course of reasoning, the California Court held that Conn. General was, therefore, actually *helped* by the tax deductions California allowed *other* companies; and being so helped, California was entitled to tax Conn. General on its *Connecticut* transactions, because of such alleged financial benefit to it through California's *tax deductions* allowed *other* companies!

2. From such illogical reasoning, the California Court, by a *tour de force,* then held that "the gross premiums received upon its [Conn. General's] business done in *this state*" must be held *to include* all sums collected by Conn. General *in Connecticut* from other companies for the reinsurance of such other companies' liabilities under their California policies, even though the reinsurance treaties were "executed and carried into effect wholly

without the state [of California]" (R. 32; 3 Cal. (2d) 83, 89).

3. Despite the fact that the reinsurance treaties were thus wholly consummated *in Connecticut,* and the entire consideration and indemnities paid *in Connecticut,* nevertheless Conn. General is *"estopped* to deny that said reinsurance was consummated in the state [California] unless and until it [Conn. General] can show that the insurer [other companies] has paid the full tax on gross premiums without exemption" (i. e. without deducting from their gross premiums the amounts which such reinsured companies paid to Conn. General in Connecticut—a constitutional exemption expressly given to such other companies by the California Constitution §14(b), (Id.).

4. Therefore, Conn. General is "liable for the tax computed upon its entire business transacted during those years, including its reinsurance of risks to property* situated in this state" (R. 32).

5. California maintains that foreign companies may "by a simple process of reinsurance outside the state" escape all premium taxes, unless the decision appealed from be upheld. (Conn. General v. Johnson, 3 Cal. (2d) 83.

The foregoing argument must be rejected;

(1) It is difficult to deal seriously with such reasoning. Of course, California's voluntary tax exemption to some companies was a financial benefit to them; but such

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* That is a clear error of fact, as Conn. General was not a fire insurance company in any sense; never reinsured any risks to *property* in California, but merely reinsured other companies' risks on the lives of California residents, under policies which such *other companies* had written in California.

financial benefit was not the reason why such companies were able to pay the reinsurance premiums in Connecticut to Conn. General. If California should (*a*) by altering its Constitution or (*b*) by a reversal of its Supreme Court's interpretation of its Constitution, now deny those deductions, and, thereby, those companies were not financially able to pay the premiums demanded by Conn. General, those companies would simply be unable to reinsure their risks—that it all there is about it.

It is certainly no valid constitutional argument (in support of California's right to tax the Conn. General) to say that if California did not tax it, California would have to tax the *other* companies more heavily. Whether California taxes other companies more heavily or less heavily is purely a matter for California's own determination, but that sheds no light whatever on the *power* of California to tax transactions *in Connecticut.* There is not a scintilla of evidence in the record that if California would withdraw its tax exemption to other companies, such other companies would be unable to pay to the Conn. General in Connecticut the reinsurance premiums which it charges for reinsuring risks. But however that may be, it is not an argument to support California's right to tax the Conn. General on account of reinsurance premiums paid in Connecticut under contracts made in Connecticut.

Finally, to say that California's favor (extended to other insurance companies in California) indirectly enabled such companies to give profitable business to Conn. General in Connecticut and thereby justifies California in taxing Conn. General because of such favors to others, is about the same thing as saying that if Kansas' climate and laws permit wheat to be produced at a very low cost, thereby enabling Minnesota flour mills to manufacture flour so cheaply that these mills can sell the flour at a big

profit, Kansas is thereby justified in taxing Minnesota mills, on the ground that such mills are deriving a profit through benefits extended to them by Kansas!

(2) Of course, the California Supreme Court has the exclusive right to say what its own Constitution means; and if it says that gross premiums received from "business done" in California include premiums collected upon business done in Connecticut, such *interpretation* is binding here. But such interpretation does not thereby give any validity to California's effort to tax something that is done in Connecticut.

(3) In face of the undisputed fact that the treaties were made, premiums and losses paid, and every act of performance done, *in Connecticut alone*—and that absolutely *nothing* was done in California—the Supreme Court still says that the Conn. General is "estopped to deny" those facts until it can show that the reinsured companies have "paid the full tax of gross premiums *without* exemption" (3 Cal. (2d) p. 89). It is useless to discuss such an argument. No doctrine of estoppel is involved. There is no burden on Conn. General to show whether other insurance companies have or have not paid their taxes to California.

The only question is whether California has the constitutional power to tax Conn. General on reinsurance premiums collected *in Connecticut*. The answer to that question does not depend on any question of estoppel, or on Conn. General showing that *other* companies have paid something *more* than California law requires such other companies to pay. The answer to the question depends solely upon whether, under the admitted facts, California grants to Conn. General such a franchise or privilege as justifies a California tax upon undisputed transactions *in Connecticut*.

(4) (5) If California is dissatisfied with the financial effect of granting a tax exemption (i.e. deduction of reinsurance premiums from gross premiums in determining the amount of premiums to be taxed at 2.6%), all that California has to do, is to do just what Pennsylvania and New York have done*, to-wit: *repeal that deduction,* and levy the tax primarily upon *all* the premiums collected in the State upon *all* business done in the State. In that event, the Equitable, New York Life, Atlantic Life and Conn. General (in our illustrations above) would each pay $13,000 tax; and in addition, Vermont Life would pay $2,600 tax.

The reason California does not do that, is that California (a) wishes to encourage companies to do business in California, and to do business only with other companies admitted to do business there or (b) wishes to protect its citizens by encouraging reinsurance, thereby, aiding in assuring the solvency of the companies. But the motive of California in granting the exemptions to other companies sheds no light on California's Constitutional power to tax Conn. General on *Connecticut* transactions.

California's error here is obvious. As Honorable Francis J. DeCelles, of Massachusetts, pointed out in his report to the National Convention of Insurance Commissioners in June, 1936:

> "Net direct premium volume would give to every state its proper tax from one of the original parties to the contract. We would eliminate the necessity of this constant checking and re-checking of company records with its consequent expense. Companies ceding insurance could and should retain that increment of the premium which represents the tax paid by the policyholder. This tax is usually included in the premium loading, and should be paid direct without

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* N. Y. Laws 1937, Ch. 530, p. 1200-1; Pa. Act 269 of 1933, p. 1095-6.

the necessity of following it through the books of several companies. The effect would be the same—not one cent of tax would be lost to the states. However, a lot of time and expense of collection would be saved. Reports of ceding companies rarely agree with the reports of accepting companies. Companies with different fiscal years or annual bases cause considerable confusion. We could save thousands of dollars annually by simplifying this basis." Proceedings N. A. I. C. 1936, P. 84, 85.

THIRD POINT

California denied Conn. General the equal protection of its laws in holding that Conn. General must pay a tax amounting to 5.5% of its premiums on California business, when other companies similarly located (but not doing a reinsurance business outside of California) are required to pay only 2.6% tax on California business.

In 1930-31 Conn. General collected $750,252.45 premiums on its California business. California required Conn. General to pay a tax for the privilege of doing this business in the amount of $41,244.16. This tax, measured by the California business of Conn. General, is at the rate of 5.5% of this business.

In another foregn life insurance company (***without*** any reinsurance business) collected also $750,252.45 premiums on account of California business, California would collect a tax from this company for the privilege of doing the same business, not at the rate of 5.5%, as imposed on Conn. General, but at the rate of 2.6%. The tax would be $19,506.56 instead of $41,244.16.

The effect of including this reinsurance business done ***outside*** of California in measuring Conn. General's tax on business in California, is that Conn. General pays for the privilege of doing business in California a tax at ***more than double the rate*** which other companies pay. The competitive disadvantage to Conn. General is at once apparent.

In 1930-31, it so happened that the business Conn. General did in California was almost equal to the reinsurance business taxed, which business was not done in California. The tax imposed on Conn. General was, therefore, just a little more than double what another company would have to pay for doing similar business. Assume, however, that Conn. General's ordinary insurance business done *in* California decreased, so that only $10,000 in premiums was collected by Conn. General on account of this business. Under California's method of taxation, the result would be that all of this $10,000 would be confiscated and California would call on Conn. General to bring into California other money to pay the balance of the tax. This California may not do (*Western Union Telegraph Co.* v. *Kansas*, 216 U. S. 1).

In taxing Conn. General on account of California business at a higher rate than other companies with a like amount of California business, that state denies Conn. General the equal protection of its laws in violation of the Fourteenth Amendment. The basis of distinction is arbitrary and unreasonable (*Hanover Insurance Company* v. *Harding*, 272 U. S. 494).

CONCLUSION

The judgment of the California Supreme Court should be reversed.

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